Supreme Court, U.S.
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No. 08-831

In the Supreme Court of the United States

GREGORY LANGLEY

Petitioner

v.

COMMONWEALTH OF KENTUCKY

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1 Whether an undercover videotape made by a now unavailable confidential informant is testimonial evidence for purposes of exclusion pursuant to the Sixth Amendment's Confrontation Clause.

2 Whether the Petitioner's equal protection rights were violated due to the exclusion of African-American jurors from the venire.

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In the Supreme Court of the United States

No.
GREGORY LANGLEY

PETITIONER

VERSUS

COMMONWEALTH OF KENTUCKY

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Gregory Langley respectfully prays that a writ of certiorari issue to review the order of the Kentucky Supreme Court which affirmed the opinion of the Henderson Circuit Court of the Commonwealth of Kentucky holding that the majority of an undercover video taken by a now unavailable confidential informant was not testimonial and thus not a violation of the Petitioner's right to confront witnesses against him pursuant to the Confrontation Clause of the Sixth Amendment. The Petitioner also seeks review of the Kentucky Supreme Court's ruling that the testimonial portion of the videotape was harmless error. Furthermore, the Petitioner asserts that his equal protection rights were violated due to an unconstitutional array of venirepersons at the trial court level due to the fact that the Commonwealth exercised a preemptory

challenge on an African-American juror in violation of this Court's precedent set forth in *Batson v. Kentucky*, 476 U.S. 79, (1986).

STATEMENT OF JURISDICTION

On December 8, 2006, the Henderson Circuit Court issued an order denying Petitioner a new trial. On March 20, 2008, the Supreme Court of Kentucky case number 2006-SC-853-MR denied relief to Petitioner Langley.

The jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. § 1257 which states: "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States..." and Rule 13 et seq of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district

> shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Material Facts

On October 12, 2006, in the Henderson Circuit Court, in Henderson, Kentucky, Gregory Langley, hereinafter Petitioner was convicted of the offenses of Trafficking in a Controlled Substance (Methamphetamine) and First Degree Persistent Felony Offender. All relevant parties to the action were African American including the Petitioner and the only eye witness. The initial venire panel contained two African American women,

one of whom was struck for cause, the other whom the Commonwealth exercised a preemptory challenge upon. The Petitioner asserts the exercise of the preemptory challenge on the only remaining African American on the venire was in violation of Petitioner's equal protection rights under the Fourteenth Amendment and a violation of this Court's holding in *Batson v. Kentucky*, 476 U.S. 79, (1986)..

At some time prior to trial, the Commonwealth's only witness to the alleged drug transaction, the confidential informant, informed the Commonwealth that he would not testify. Prior to opening statements, the Henderson Circuit Court conducted a closed hearing to determine if the confidential informant's refusal to testify was the result of an invocation of some privilege or whether he was merely refusing to testify. The Court determined that the confidential informant was just refusing to testify and was not invoking any known privilege. At this point the Commonwealth stated that it could meet its burden of proof without the confidential informant by showing a videotape allegedly made by the informant on the day of the alleged drug transaction. It is the introduction of this videotape which Petitioner claims was reversible error in that the content of the videotape was testimonial in nature in its entirety and thus the Petitioner's Sixth Amendment Right to Confront his accuser was violated by his inability to cross examine the confidential informant in this case. The Petitioner was subsequently convicted of both charges and was sentenced to ten years on the persistent felony offender charge and twenty years on the trafficking charge, for a total sentence of thirty years.

The Petitioner filed a timely appeal to the Kentucky Supreme Court and on March 20, 2008, the Court issued a non-published opinion holding that Petitioner's Fourteenth Amendments rights were not violated by the Commonwealth exercising the preemptory challenge on the African American venireperson and that the trial court did not err in admitting the videotape with the exception of one harmless error. The harmless error in admitting the videotape, according to the Kentucky Supreme Court was the portion where the confidential informant names the Petitioner as the individual from whom the methamphetamine was purchased. This error, according to the Kentucky Supreme Court was harmless because the erroneously admitted evidence was "harmless beyond a reasonable doubt" and the evidence presented against the Petitioner was "compelling to prove his guilt."

On March 31, 2008 Petitioner filed a Petition for Rehearing before the Kentucky Supreme Court and on August 21, 2008 the Court denied the Petition for Rehearing. This Petition for a Writ of Certiorari follows.

B. Questions of Law Presented for Review

I Whether an undercover videotape made by a now unavailable confidential informant is testimonial evidence for purposes of exclusion pursuant to the Sixth Amendment's Confrontation Clause.

The Confrontation Clause holds that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."

The Confrontation Clause requires three essential conditions on testimony offered against a defendant. First, it must be given in the presence of the defendant. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). Second, the defendant must have the opportunity to cross examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Third the witness must give the testimony at trial unless he or she is unable to testify. Id *Davis v. Washington*, 547 U.S. 813 (2006) clarified that the Sixth Amendment confrontation clause ruling presented in the *Crawford* decision applies to statements made to law enforcement officers through an affidavit prepared at a scene. Essentially, the *Davis* decision extended the *Crawford* decision not only to confrontational statements, but to tangible items such as sworn documents and in Mr. Langley's case, a video recording that can be authenticated by law enforcement officers should the witness become unavailable before trial. Under *Davis*, it appears that any statement made to or elicited by a police officer, other law-enforcement personnel, or a judicial officer under circumstances objectively indicating at the time made that the primary purpose to which the statement will be used by the government is to establish or prove past events potentially relevant to later criminal prosecutions is "testimonial." It is the Petitioner's position that the entire video admitted by the trial court in this case was testimonial in nature and thus should have been excluded as evidence as violative of the confrontation clause of the Sixth Amendment.

Pursuant to *Crawford v. Washington*, 541 U.S. 36, 59 (2004), "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Regarding the issue of

whether the informant statements were testimonial, the rule in *Crawford* has been applied to cases involving the out-of-court statement of an informant. *See United States v. Cromer*, 389 F.3d 662 (6th Cir. Mich. 2004). In *Cromer*, the Sixth Circuit Court of Appeals held that "statements of a confidential informant are testimonial in nature and therefore may not be offered by the government to establish the guilt of an accused absent an opportunity for the accused to cross-examine the informant." *Id.* at 670-71. In determining that such a statement was testimonial, this Court analyzed the opinion in *Crawford*. It noted that the "Court emphasized that, 'an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.'" *Cromer*, 389 F.3d at 672 (citing *Crawford*, 124 S.Ct. at 1364).

In addition, the Court held that statements of a confidential informant are almost always testimonial in nature and are thus subject to the Confrontation Clause.

> Statements of a confidential informant are testimonial. Indeed, such statements fall squarely within the paradigm: A statement made knowingly to the authorities that describes criminal activity is almost always testimonial. Tips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial. The very fact that the informant is confidential- i.e., that not even his identity is disclosed to the defendant heightens the dangers involved in allowing a declarant to bear testimony without confrontation. The allowance

> of anonymous accusations of crime without any opportunity for cross-examination would make a mockery of the Confrontation Clause.
>
> *United States v. Cromer*, 389 F.3d 662 (6th Cir. Mich. 2004)

Furthermore, commentators have held that if a statement is made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime, then the statement should be deemed testimonial. Richard D. Friedman & Bridget McCormack, Dial-In Testimony 150 U. Pa. L. Rev. 1171, 1240. "A statement made knowingly to the authorities that describes criminal activity is almost always testimonial." Emphasis added Richard D. Friedman, Confrontation: The Search for Basic Principles, 86 Geo. L.J. 1011, 1042-43 (1998)

In *United States v. Hearn*, 500 F.3d 479, 484 (6th Cir. Tenn. 2007) the Sixth Circuit Court of Appeals reaffirmed *Cromer*, *supra* and held

> The Sixth Amendment protects a defendant's right to confront witnesses. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). In *United States v. Cromer*, this court held that a defendant suffered a Sixth Amendment confrontation violation "[b] ecause there was a testimonial, out-of-court statement [from a confidential informant], offered to establish the truth of the matter asserted, and [the defendant] was provided no opportunity to cross-examine the [confidential informant]."

389 F.3d 662, 677-78 (6th Cir. 2004). The same occurred here; Hearn did not have an opportunity to cross-examine the confidential informants who, through the police officers, were able to accuse Hearn of intending to traffic drugs. In *United States v. Pugh*, 405 F.3d 390 (6th Cir. Oh. 2005) moreover, this court held that prosecutors violated a defendant's Sixth Amendment rights because there was no conceivable reason (besides offering testimonial, out-of-court statements about a defendant's guilt) for admitting a positive identification of a defendant. 405 F.3d at 400. In this case, similarly, there was no conceivable reason, besides implicating Hearn, for the officers to testify that a confidential informant told them that Hearn placed the drugs in his car and was driving to Nashville to sell them.

The second prong of the *Crawford* analysis requires a determination of whether the statement was offered for the truth of the matter asserted. *United States v. Pugh*, 405 F.3d 390. In *Cromer*, *supra* any potential doubts about whether statements were offered for the truth of the matter asserted was resolved by the prosecutor's closing argument, wherein the government's counsel argued that Cromer was guilty because he matched the description offered by the confidential informant. *United States v. Cromer*, 389 F.3d 662. In the case *sub judice*, the Commonwealth's closing argument is similar to the facts in *Cromer*. In this case, the Commonwealth argued that the Petitioner was guilty because the confidential informant stated that he received the methamphetamine from Petitioner Langley. In closing argument, the Commonwealth also argued the following:

"The video is the best evidence as to what occurred;" The video shows the informant in car with defendant. The Commonwealth in their closing statement relied heavily on the testimonial hearsay statements of the confidential informant. On the end of the tape Detective Duval even asks the confidential informant: "who did it come from?" Mr Johnson answered this question by referring to the Petitioner by name, Jermaine. Because the prosecutor in this case in closing argument relied on the statements of the confidential informant in order to argue that Mr. Langley had sold the methamphetamine, it is the petitioner's assertion that the statements were offered for the truth of the matter asserted thus satisfying the second prong under *Crawford*.

The Kentucky Supreme Court held that the portion of the videotape in which the confidential informant names Petitioner Langley as the person from whom the methamphetamine was purchased, was testimonial in nature and should have been excluded pursuant to *Crawford*. However, the Court also held that under the harmless error analysis, the error was harmless. "In determining whether an error is harmless, the reviewing court must take account of what the error meant to [the jury], not singled out and standing alone, but in relation to all else that happened." *United States v. Hardy*, 228 F.3d 745, 751 (6th Cir. Oh. 2000) (citing *Kotteakos v. United States*, 328 U.S. 750, 764,90 L. Ed. 1557,66 S.Ct. 1239 (1946)) (alteration in original). In other words, it must find "that it was more probable than not that the error materially affected the verdict." *United States v. Trujillo*, 376 F.3d 593, 611 (6th Cir. Mich. 2004). *United States v. Pugh*, 405 F.3d 390 (6th Cir. Oh. 2005). It is the Petitioner's assertion that it was more probable than not that the admission of the confidential

informant's testimonial hearsay, naming the petitioner as the individual who sold the methamphetamine, materially affected the verdict in this case. Accordingly, the Petitioner's Sixth Amendment's right to confront his accuser was violated and he is entitled to a new trial.

II Whether the Petitioner's equal protection rights were violated due to the exclusion of African-American jurors from the venire.

The Petitioner in this case, Gregory Jermaine Langley, is an African-American male. During the initial jury venire, the Commonwealth sought to exclude the only two African-American jurors. The first African-American juror was excluded for cause and thus *Batson v. Kentucky*, 476 U.S. 79 (1986) does not apply. However, the second African-American juror, Ms. Poindexter was excluded by the Commonwealth on a preemptory basis, thus triggering the standard as set forth in *Batson*, *supra*. Pursuant to *Batson*, the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. *Batson citing Strauder v. West Virginia*, 100 U.S. 303 (1880). *Batson* provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race:

> "'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question and third, in light of the parties' submissions, the trial court must determine

> whether the defendant has shown purposeful discrimination.'" *Miller-El v. Dretke*, 545 U.S. 231 supra, at 277, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Thomas, J., dissenting) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 328-329, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

In *Batson*, this Court held that a defendant may establish a prima facie case of discrimination on proof that members of the defendant's race were substantially underrepresented on the venire from which the jury was drawn.

> In cases involving the venire, this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination." *Whitus v. Georgia*, supra, at 552; see *Castaneda v. Partida*, *supra*, at 494; *Washington v. Davis*, *supra*, at 241; *Alexander v. Louisiana*, supra, at 629-631. This combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse.

The Sixth Amendment requires that the jury be a fair cross-section of the community. "Large distinctive groups" such as minorities and women may not be categorically excluded nor substantially underrepresented. In *Duren v. Missouri*, 439 U.S. 357 (1979) this Court invalidated a rule where women could opt out of juries upon request. *Duren* stated the

test for determining a violation of the fair cross-section requirement:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Missouri's rule, which resulted in the clear statistical underrepresentation of women on jury panels, violated the Sixth Amendment's fair cross-section requirement.

In the case *sub judice*, it is the Petitioner's assertion that the Commonwealth of Kentucky sought to exclude the only African-American juror from the prospective jury panel. Pursuant to *Batson*, the Commonwealth's exclusion of all of the African-American jurors satisfies the prima facie requirements of intentional, non race neutral discrimination and the burden of proof than shifts to the Commonwealth to prove otherwise. It is the Petitioner's assertion that the Commonwealth did not offer an adequate race-neutral basis for excluding the only remaining African-American juror, Ms. Poindexter. Because members of the Petitioner's race were substantially underrepresented on the venire, it is the Petitioner's position that he has made a prima facie showing of discriminatory intent on behalf of the Commonwealth of Kentucky. Accordingly, the Petitioner in this case was denied a fair trial and his right to equal protection was denied by the racially based exclusion of African-American jurors.

CONCLUSION

Based on the foregoing argument, the Petitioner Gregory Jermaine Langley respectfully requests this Honorable Court to grant certiorari in the above-styled action.

Respectfully submitted,

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